NO. 83-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

WALTER KEY WILLIAMS,

Petitioner,

V.

STATE OF TEXAS,

Respondent

83-5995

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

On June 22, 1983, the Texas Court of Criminal Appeals issued an opinion affirming Petitioner's conviction for capital murder and his sentence of death. Subsequent thereto, the Court of Criminal Appeals of Texas denied, without written order, Petitioner's motion for rehearing.

Petitioner has been condemned to die by lethal injection. Since Petitioner's life is at stake, undersigned counsel firmly believes that several constitutional violations occurred in this case that warrant review by this Court. Petitioner respectfully submits five issues for the Court's consideration:

I. Whether Article 37.071 of the Texas Code of Criminal Procedure impermissibly allows an unadjudicted extraneous offense into evidence at the punishment phase of a capital murder case in violation of the due process and equal protection clauses of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II. Whether the Texas Death Sentencing statute violates the Eighth Amendment to the United States Constitution in that it precludes the jury from considering evidence of Petitioner's youth in Mitigation of Punishment.

III. Whether the imposition of the death penalty violates the Ninth Amendment in that it deprives Petitioner of his right to life.

IV. Whether the fruits of the warrantless search of Petitioner's home were obtained in violation of his Fourth and Fourteenth Amendment rights to be free from unreasonable searches and seizures.

V. Whether Petitioner was denied effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, WALTER KEY WILLIAMS, respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals in this case.

CITATION TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals which was rendered on June 22, 1983 was unpublished. Petitioner has attached a copy of said opinion as Appendix A.

JURISDICTION

Jurisdiction of the Court is invoked under 28 USC §1254(1). The Judgment of the Texas Court of Criminal Appeals was entered on June 22, 1983. A timely petition for rehearing was denied on September 14, 1983. Petitioner timely seeks review by this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;

the Fifth Amendment to the Constitution of the United States which provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;

the Sixth Amendment to the Constitution of the United States which provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense;

The Eighth Amendment to the Constitution of the United States which provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

the Ninth Amendment to the Constituion of the United States which provides that:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people;

and the Fourteenth Amendment to the Constitution of the United States, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within is jursidiction the equal protection of the laws.

This case also involves the Texas statute governing the punishment phase of a capital murder trial. See, Texas Code of Crim. Proc. § 37.071.

STATEMENT OF THE CASE

A. Course of Proceedings

On January 20, 1982, Petitioner, WALTER KEY WILLIAMS, was convicted of capital murder in the 226th Judicial District Court of Bexar County, Texas. On June 22, 1983, the Texas Court of Criminal Appeals affirmed his conviction (opinion unpublished) and on September 14, 1983, Petitioner's motion for rehearing was denied without written order. On October 13, 1983 this Court stayed the issuance of the mandate pending the time filing of a petition for a writ of certiorari. Petitioner now timely files his petition for writ of certiorari.

B. Statement of Relevant Facts

1. Admission of unadjudicated extraneous offense at punishment stage.

The admission of unadjudicated offense at punishment phase Petitioner's capital murder conviction under Texas law required proof beyond a reasonable doubt that he committed an intentional killing in the course of a robbery or attempted robbery. Once the jury returned a verdict of "guilty", the trial Court was required to conduct a "separate sentencing proceeding before the same jury to determine whether the Petitioner shall be sentenced to life or death". Vernon's Ann. C.C.P. Art. 37.071(a).

Upon conclusion of the presentation of evidence,[1] the Court submits to the jury several special issues which will determine whether an individual shall live or die. It is this evidence presented at this bifurcated proceeding that decides the fate of the damned.

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1. Petitioner's now discharged appointed counsel presented no evidence at the guilt stage or at the critical punishment stage. Petitioner addresses this issue infra under heading, "ineffective assistance of counsel".

In the instant case, the State was allowed to present to the jury, at the punishment stage, detailed and gruesome facts of an unadjudicated extraneous offense. [R. Vol. XVI, p. 25]

The calculated manner in which the State offered this evidence served the sole and successful purpose of sufficiently inflaming the jurors so they would return an affirmative answer to the second special issue:

> "whether there is a probability that the Defendant would commit acts of violence that would constitute a continuing threat to society".

Vernon's Ann. C.C.P. Art. 37.071(b)(2).

The State introduced no evidence of Petitioner's prior record because he had none. Nor did the State present any psychiatric evidence or character evidence on the Petitioner's propensity to commit future crimes of violence. Petitioner can only conclude that it was on the basis of the damaging evidence of an unadjudicated extraneous offense that the jury answered affirmatively to the second special issue.

2. Admission of fruits from warrantless search of home

According to the testimony adduced at the pre-trial hearings and trial, officers of the San Antonio police department responded to a robbery call at a Circle K store. [Rec. Vol. I, p. 2-4; Vol. III, p. 23]. Once on the scene, they obtained information from two individuals: Theodore Edwards who admitted being involved in the robbery [Rec. Vol. I-p.5] and Robert Gutierrez. Edwards advised a police officer that the man he was with was named Walter and he lived on Wyoming Street [Rec. Vol. I, p. 6]. He further

stated that the weapon used was a long-barreled revolver [Rec. Vol. I, p. 6] and the only description he gave was that Walter was black and drove a Ford vehicle. [Rec. Vol. I, p. 29].

Gutierrez testified that he had seen two black males in the Circle K Store who were trying to pry open a cash register. [Rec. Vol XV, p. 58]. Gutierrez also gave the officers a description and license number of the vehicle. [Rec. Vol. XV, p. 61-2].

With this information, Edwards directed the police to a house on Wyoming Street, where a vehicle, matching the description, was parked in the driveway near the back of the house. [Rec. Vol. I, p. 7-8].

Some nine (9) uniformed police officers approached the house, covering both the front and rear exits. When Petitioner's father answered the door, the officers sought information regarding Petitioner. [Rec. Vol. I, p. 9]. Once inside the house, the officers proceeded to Petitioner's room where they observed a long-barreled revolver. [Rec. Vol. I, p. 10, 39, 40].

In the course of this warrantless intrusion, Petitioner's father was never advised that he had a right to refuse the arresting officers entrance into his home. [Rec. Vol. XVII, p. 5]. Furthermore, the "consent forms" relied on by the State to justify this warrantless search, were not obtained until <u>after</u> the house was entered, the premises searched, and the evidence seized. [Rec. Vol. XIII, p. 68]. Finally, Petitioner's father testified that he thought the consent form authorized <u>only</u> a search of the vehicle and not the home. [Rec. Vol. XVII, p. 14].

3. Ineffective assistance of counsel

Petitioner was appointed counsel to represent him at his trial and to pursue his appeal. When Petitioner's conviction was affirmed and appointed counsel desired to abandon this cause, undersigned counsel agreed to pursue Petitioner's claims on a pro bono basis.

Petitioner believes that appointed counsel failed to provide adequate and effective representation throughout the proceedings below. Specifically, and most flagrantly, appointed counsel failed to put on any defense whatsoever. Of equal (if not more) importance, appointed counsel failed to put on a single witness at the critical sentencing stage, leaving Petitioner in the lurches of what the jury must have believed to be overwhelming and uncontradicted evidence. For example, despite the Petitioner's previously clean record, no evidence was put on as to this point; no reputation witnesses; no character witnesses; not even the Petitioner's family or Petitioner himself who placed his fate in the hands of the ineffective counsel.

Furthermore, Petitioner's appointed counsel failed to raise on appeal critical issues regarding the legality of the arrest or the admissibility of the statements made while in custody. These are issues so central to this cause of action that even recently licensed attorneys would have known to pursue them on appeal. To further accentuate this point, court appointed counsel even failed to appear at oral argument when the life or death of his client was in issue. Surely an individual who is facing the extinction of his very existence is entitled to a more vigorous and competent representation than he received in the proceedings below.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Petitioner is a Texas inmate condemned to die by lethal injection. His conviction and death sentence raise substantive questions as to whether the conviction and sentence of death were obtained in violation of his constitutional rights. More importantly, this Petition affords this Court the opportunity to address a pecularity of the Texas death sentencing practice that has been condemned by other sister states. Finally, this appeal raises the novel question of whether Petitioner's sentence violates the Ninth Amendment.

Petitioner's first issue warranting certiorari is whether the Fifth and Fourteenth Amendment guarantees of due process prohibits the admissibility of unadjudicated extraneous offenses at the critical sentencing stage of a capital murder trial. Different resolutions of this question by several states have resulted in inconsistent constitutional theories. Compare State v. Bartholomew, 654 P2d 1170 (Wash. 1980) vacated, ___ US ___ 103 S.Ct. 3530 (1983) [to be reconsidered in light of Zant v. Stephens, ___ US ___, 77 LEd2d 235 (1983)], with Walter Key Williams v. State, ___ SW2d ___ (Cause No. 68,971, decided June 22, 1983, en banc), Under one theory, Petitioner's sentence of death would be rendered unconstitutional and set aside; the other would circumvent the exercise of fundamental rights and allow Petitioner to die.

Petitioner's second claim involves the abrogation of his guarantee against cruel and unusual punishment resulting from the jury's inability to consider Petitioner's youth as a factor militating against a finding that the Petitioner should receive the death penalty. To execute the Petitioner

would deprive him of the assurance that his jury acted within its informed discretion, considering all the crucial factors, including evidence that petitioner was not within the narrow class of those eligible for the death penalty. Eddings v. Oklahoma, 455 US 104 (1982); Barclay v., Florida, ___ US ___, 77 LEd2d 1134 (1983); Zant v. Stephens, ___ US ___, 77 LEd2d 235 (1983).

The third issue warranting consideration by this Honorable Court revolves around the novel question of whether the imposition of the death sentence violates the rights guaranteed to the Petitioner by virtue of the Ninth Amendment to the United States Constitution.

The history and language of the Ninth Amendment reveals that there are "additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments ..." Griswold v. Connecticut, 381 US 479, 488 (1965). This Court has only been confronted with a handful of cases that raise Ninth Amendment claims. Many of the recent cases involved the issue of the right to privacy. Petitioner seeks the opportunity to raise and develop a more fundamental issue: does the Ninth Amendment secure an individual's right to life and thereby prohibit the Government from abridging same? Petitioner believes that before his life is to be extinguished by the State of Texas, this novel question is ripe for consideration by this Court.

The fourth issue raised by the Petitioner is whether the Fourth and Fourteenth Amendments preclude the admission of the murder weapon seized as a result of the warrantless entry by the police into his home. The Texas Court of

Criminal Appeals justified this search and seizure on the grounds that: (1) the entry into the home was consensual. Coolidge v. New Hampshire, 403 US 443 (1971); Schneckloth v. Bustamante, 412 US 218 (1973); and, United States v. Matlock, 415 US 164 (1974); and, (2) that the evidence seized was justified under the "plain view" doctrine. Coolidge v. New Hampshire, Supra; Texas v. Brown, ___ US ___, 103 S.Ct. 1535 (1983).

This Court has had opportunities to confront this issue of consent and has announced a "bright line" rule that consent is determined from the "totality of circumstances" Schneckloth v. Bustamante, Supra at p. 227, and that the consent was freely and voluntarily given. Bumper v. North Carolina, 391 US 543 (1968). With Petitioner's life at stake, the question of whether Petitioner's father gave consent to the nine (9) uniformed police officers who surrounded his house at 4:15 in the morning [Rec. Vol. I, p. 7-8], is worthy of scrutiny by this Court.

Additionally, the record reveals that the Petitioner's father was never advised that he had a right to refuse consent. [Rec. Vol. XVII, p. 5]. This Court has held that, "Although the Constitution does not require proof of knowledge of a right to refuse as the sine qua non of an effective consent to a search, ... such knowledge was highly relevant to the determination that there had been consent." United States v. Mendenhall, 446 US 544, 558-559 (1980). The questions raised by Petitioner were overruled by the Texas Court of Criminal Appeals, but in light of the profound sentence imposed upon Petitioner, they are worthy of re-examination by this Court.

Petitioner's final claim involves the abrogation of his Sixth Amendment guarantee of effective assistance of Counsel. Restating the issue, this Court has an obligation to review a condemned man's sentence when his court appointed counsel failed to effectively represent his client. Specifically, how can this Court uphold a death sentence when now discharged counsel failed to put on any defense, failed to put on any evidence at the critical punishment phase of a capital murder case, failed to raise substantive Fourth Amendment issues on appeal, and even failed to appear at oral argument before the Texas Court of Criminal Appeals.

I.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE ADMISSION OF AN UNADJUDICATED EXTRANEOUS OFFENSE AT THE PUNISHMENT STAGE OF A CAPITAL MURDER CASE VIOLATES THE FIFTH AND FOURTEENTH AMENDMENTS

A. The Texas Court of Criminal Appeals Erred in Affirming Petitioner's Death Sentence Where the State of Texas was Allowed to Bring Before the Jury, at the Punishment Stage, Detailed and Gruesome Facts of an Unadjudicated Extraneous Offense.

The Texas Court of Criminal Appeals has consistently and repeatedly held that evidence of alleged unadjudicated extraneous offenses may be introduced by the prosecution at the penalty phase of a capital trial. As a result, this highly prejudicial practice is becoming a frequent occurrence in Texas capital cases. This Court should put an end to it.

The Court of Criminal Appeals first announced its view on the subject in Garcia v. State, 581 SW2d 168, 17879 (Tex. Crim. App. 1979). There, the prosecution in essence put the defendant on trial for an unadjudicated 1974 burglary charge at the penalty phase. The Court of Criminal Appeals rejected Garcia's attack upon the admissibility of such evidence, holding that:

> Nothing in [Tex. C.C.P.] Article 37.071 ... requires that there be a final conviction for an extraneous offense to be admissible at the punishment phase. Clearly, evidence of prior offenses falls within the range of "prior criminal conduct." Such "prior criminal conduct" is clearly relevant to the jury's deliberations on special issue number two, submitted to the jury at the punishment phase. Therefore, we hold that the trial court did not err in admitting into evidence testimony concerning the burglary.

Id. at 179.

This practice was upheld again in Williams v. State, 622 SW2d 116, 121 (Tex. Cr. App. 1981), where the Court of Criminal Appeals found no constitutional harm in allowing

the jury to hear evidence of an alleged unadjudicated rape charge against the defendant. Other cases upholding similar practices include Milton v. State, 599 SW2d 824, 827 (Tex. Cr. App. 1980); McManus v. State, 591 SW2d 505, 526-27 (Tex. Crim. App. 1979); and Rumbaugh v. State, 589 SW2d 414, 418 (Tex. Crim. App. 1979).

While the Texas Court of Appeals has consistently allowed the introduction of unadjudicated extraneous offense at the penalty phase of capital cases, such evidence has elsewhere been held federally unconstitutional. State v. Bartholomew, 98 Wash. 2d 173, 654 P2d 1170, 1184, 1185, (1982); State v. McCormick, 397 N.E. 2d 276 (Ind. 1979); See also Cozzolino v. State, 584 SW2d 765 (Tenn. 1979); Provence v. State, 357 So. 2d 783 (Fla. 1976); State v. Rust, 250 NW2d 67 (Neb. 1977); State v. Stewart, 250 NW2d 849 (Neb. 1977); State v. Holtan, 250 NW2d 876 (Neb. 1977); State v. Goodman, 257 SE2d 569, 583-4 (N.C. 1979). As the Supreme Court of the State of Washington recently held in State v. Bartholomew, Supra, 654 , P2d at 1184:

> "To allow the jury which has convicted defendant of aggravated first degree murder to consider evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant. A jury which has convicted defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions."

The admission of the unadjudicated offense is particularly disturbing for two reasons: (1) Not only was the jury

advised of the nature of the offense, but they were exposed to the horrid and gruesome facts thereof; and, (2) the sole evidence relied upon by the State to demonstrate Petitioner's likelihood to commit future acts of violence was the unadjudicated offense. Surely this evidence served no purpose but to inflame the minds of the jury, and cause them to take the kind of arbitrary and capricious action condemned by this Court:

> "The thrust of our decisions on capital punishment has been that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Zant v. Stephens, ___ US ___, 11, 77 L Ed 2d 235, 103 S Ct ___ (1983), quoting Gregg v. Georgia, 428 US 153, 189, 49 L Ed 2d 859, 96 S Ct 2909 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

Furthermore, the Texas' Courts blind adherence to a rule allowing unadjudicated offenses to be admissible in a capital murder trial but in no other felony sentencing is illogical. With a man's life a stake, the Courts should be more prone to follow the adage that a man is innocent until proven guilty. It is consistent with our long standing tradition of due process to allow evidence of an extraneous crime to be used during a capital murder sentencing when the accused has never even been given an opportunity to test or challenge those charges.

Petitioner respectfully urges this Court to address this substantial issue and mend the divergence of opinion that exists between the sister states, and determine whether a capital conviction and death sentence based on the factfinders' sole reliance on the intimate details of an unadjudicated extraneous offense skewed the jury's ability to properly place petitioner in the narrow class of death eligible defendants. This Court should grant certiorari and resolve questions the polar answers to which can mean death in one state and life in another.

II.

THE TEXAS DEATH SENTENCING STATUTE, PRECLUDED THE JURY FROM CONSIDERING EVIDENCE OF PETITIONER'S YOUTH IN MITIGATION OF PUNISHMENT, AND THEREBY VIOLATED PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENT

In Lockett v. Ohio, 438 US 586, 604 (1978) (plurality opinion), this Court held that the sentencing authority in a capital case may "not be precluded from considering as a mitigating factor, any aspect of the defendant's character or record ..." (emphasis in original). The Court concluded that the sentencer must be permitted to accord "independent mitigating weight to aspects of the defendant's character and record," id. at 605, because the failure to do so

> "... creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments."

Ibid.[2]

The Texas death sentencing statute, as applied to the case of WALTER KEY WILLIAMS, violated the dictates of Lockett. Despite the Petitioner's tender age of nineteen (19) at the time the offense was committed, the statute served to preclude the jury from even considering that evidence in mitigation. Accordingly, the death sentence in this case must be set aside.

The sentencing process at petitioner's trial was effectively constricted by Texas law to a single statutory question:

> "whether there is a probability that the defendant would commit criminal acts or violence that would constitute a continuing threat to society."

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2. See also Green v. Georgia, 442 US 95 (1979).

Tex. Code Crim. Proc. Art. 37.071(b)(2).[3] The jury answered that question in the affirmative. With the sentencing inquiry limited to such a question, the record simply precluded consideration of any sentence other than death.

The constitutional infirmity in this procedure is that Article 37.071(b)(2), by its very terms, prevented the jury from according any mitigating consideration to the youth of the Petitioner. In many cases, the mitigating evidence available to a Texas capital defendant tends to establish that he is not dangerous (e.g., lack of prior record, duress, coercion, relatively minor participation in the crime). But here, the statute denied the jury from considering the most compelling mitigating evidence in petitioner's behalf, his youth, and condemned him to die. The Eighth and Fourteenth Amendments require that the sentencer weigh this factor, according due consideration to all "compassionate or mitigating factors stemming from the diverse frailtes of humankind." Eddings v. Oklahoma, 455 US 104 (1982); Woodson v. North Carolina, 428 US 280, 304 (1976) (plurality opinion).

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3. Article 37.071(b) poses two additional questions one of which being irrelevant to this case. Under Art. 37.071(b)(1), the jury is asked "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result." A "yes" answer to this question automatically follows from a verdict finding the defendant guilty of the capital murder, and the Texas Court of Criminal Appeals has so held. Blansett v. State, 556 SW2d 322 n. 6 (Tex. Crim. App. 1977). The question asked by Art. 37.071(b)(3) — "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased" — was not submitted to the jury.

> "[Y]outh must be considered a relevant mitigating factor. But youth is more than chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment" expected of adults. Bellotti v. Baird, 433 US 622, 635, 61 L.Ed 2d 797, 99 S.Ct. 3035 (1979)."

Eddings v. Oklahoma, Supra, at p. 115-116.

In this case, the jury was required to ignore the age of the Petitioner. The sentencer was permitted no opportunity to accord independent mitigating weight to this evidence and conclude that Petitioner's dangerousness resulted from the impetuousness of his youth.

In Jurek v. Texas, 428 US 242 at 271 (1971) (plurality opinion), this Court held that "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Applied sub judice, Texas precluded the jury from even considering the principal reason why the penalty of death should not be imposed. That reason is deeply rooted in Anglo-American jurisprudence, and is considered significant by the sentencing authority in virtually every state other than Texas. Under these circumstances, the death sentence was based on a narrow and limited inquiry, violating the Eight and Fourteenth Amendments of the United States Constitution, and must not be allowed to stand.

III.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER THE SENTENCE IMPOSED VIOLATES PETITIONER'S FUNDAMENTAL RIGHTS CONTEMPLATED BY THE NINTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Ninth Amendment to the United States Constitution in it's entirety states:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In Griswold v. Connecticut, 381 US 479 (1965) Justice Goldberg, in concurring opinion devoting several pages to the Amendment, wrote:

> "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments ... [The Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and the intent that the list of rights included not be deemed exhaustive." Griswold v. Connecticut, 381 US 479 at 488 and 492 (1965) (J. Goldberg concurring joined by C.J. Warren and J. Brennan).

The "fundamental right" at issue in Griswold v. Connecticut was the "right of privacy in marriage." This Petitioner is asserting a much more fundamental right: his right to continued existence!

For this Court to refuse to concede the fundamental nature of such right it must deny what all but the most ideological citizen would readily admit - that his own continued existence has priority over and is more important than every other ostensibly "fundamental right" including his right to bear arms; to wear his hair as he desires; and marital privacy.

Moreover, every right imaginable, whether fundamental or not, is incidental to life. If the government deprives an individual of his life it has deprived him of all rights. Logically, no right can be more fundamental than that upon

which every other right is dependent upon.

The sentence imposed upon Petitioner by the State of Texas is contrary to the Ninth Amendment because it deprives him of his right to exist; a right which Petitioner asserts is inherently and logically fundamental as underlying all others. The breadth of Petitioner's argument which challenges not his own sentence, but every death sentence imposed, and the novelty of the issue presented warrant this Court's careful thought and review.

IV.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER SEIZURE OF MURDER WEAPON VIOLATED PETITIONER'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURE

A. The Texas Court of Criminal Appeals Erred in Overruling Petitioner's Claim That the Warrantless Search of his Home and Seizure of the Murder Weapon was Pursuant to Invalidly Obtain Consent

Failure to prove that the Petitioner's father voluntarily consented to the search of the house would ban petitioner's capital conviction. To justify the warrantless search and seizure, the State of Texas has the heavy burden of demonstrating that the actions of the officers fell within one of the "carefully guarded" exceptions to the warrant requirement. United States v. Jeffers, 342 US 48 (1951); Stoner v. California, 376 US 483 (1964); Coolidge v. New Hampshire, 403 US 443 (1971).

To rely on the consent exception, the State was required to demonstrate that the consent was knowing, intelligent and voluntarily obtained. Bumper v. North Carolina, 391 US 543, 548 (1968). The established criteria for determining whether consent was volutary, is the "totality of circumstances" test:

> "[T]he question of whether a consent to a search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."

Schneckloth v. Bustamante, 412 US 218, 227 (1973). This Court reaffirmed this principle in United States v. Mendenhall, 446 US 544, 557 (1980), and more recently in Florida v. Royer, ___ US __, 103 S.Ct. 1319, 75 L Ed2d 229 (1983). As applied to the instant case, there is a substantial question of whether Petitioner's father did voluntarily consent since his home we surrounded by nine (9) uniformed police officers at approximately 4:30 in the morning. The conduct of Petitioner's

father can be characterized as a mere submission to authority and that is insufficient to constitute a finding of consent. Johnson v. United States, 333 US 10 (1948); Amos v. United States, 255 US 313 (1921). The State of Texas has attempted to bootstrap the submission to a lawful authority, or at best, an invitation to enter, into unequivocal consent. On at least three occasions the Texas Court of Criminal Appeals has held that an invitation to enter the premises is not to be equated with a finding of consent. Clemons v. State (Tex. Crim. App. 1980) 605 SW.2d 567, 571; Green v. State (Tex. Crim. App. 1980) 594 SW.2d 72; Alberti v. State (Tex. Crim. App. 1973) 495 SW2d 236.

As for the claim that the evidence was in "plain view", this issue was incorrectly decided by the Texas Court of Criminal Appeals. To uphold the seizure of evidence under the "plain view" doctrine, the officer must have viewed the evidence from a position where he had the right to be Harris v. New York, 390 US 234 (1968). This point was specifically addressed by this Court in Payton v. New York, 445 US 575 (1980), which is parallel to the instant case in many ways. Payton also involved a warrantless entry into the Defendant's home where the police discovered a weapon in plain view. This Court reversed the conviction on the grounds that the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home. Payton v. New York, Supra.

Whether Petitioner shall live or die may well turn on the issue of whether Petitioner's father is said to have consented to the search by the nine uniformed police personnel on that early morning of February 10, 1981. A man's life hinges on the answer to that question and same can best be resolved by this Court granting Petitioner's Writ of Certiorari.

V.

CERTIORARI SHOULD BE GRANTED TO CONSIDER WHETHER PETITIONER'S COURT APPOINTED COUNSEL RENDERED SUCH DEFICIENT REPRESENTATION AS TO ABRIDGE HIS SIXTH AMENDMENT RIGHT TO COUNSEL

Petitioner's appointed trial counsel provided assistance well below the Constitutional requirement of "an active advocate in behalf of his client." Anders v. California, 386 US 738 (1967). A capital murder trial commenced and concluded in two days, including jury deliberation. Part of the reason for this "swift administration of justice" was necessarily due to appointed counsel's failure to present any defense, and more importantly, counsel's failure to present any evidence at the life or death punishment stage. By any recognized standard, this inadequacy of counsel falls far below what any citizen accused is entitled to, no less an accused standing trial for capital murder.

Beginning with Powell v. Alabama, 287 US 45 (1932), this Court recognized that the Sixth Amendment guarantee of assistance of counsel meant the effective assistance from an attorney. The constitutional right to counsel which requires that the criminal justice system guarantee the effective assistance of counsel has steadily expanded in scope since the Powell decision. In assessing the competence of counsel, the various courts have gotten away from the "force and mockery of justice" test and adopted the "reasonably likely to render and rendering reasonable effective assistance" test. United States v. Thomann, 609 F2d 560 (1st Cir. 1979); Snead v. Smith, 670 F2d 1348 (4th Cir. 1982) [range of competence test]; Clark v. United States, 606 F.2d 550 (5th Cir. 1979); Poole v. Perini, 659 F2d 730 (6th Cir. 1981); United States v. Garcia, 625 F2d 162 (7th Cir. 1980); Zachringer v. Brewer, 635 F.2d 734 (8th Cir. 1980); United States v. Larios, 640 F.2d 938 (9th Cir. 1981); United States

v. Golub, 638 F.2d 185 (10th Cir. 1980); United States v. Patterson, 652 F.2d 1046 (D.C. Cir. 1981).

This Court has expressed that a greater degree of competence is associated with capital cases because of the potentially severe punishment:

> "... qualitat[ive] differen[ce] from a sentence of imprisonment however long .... Because of that qualitative difference there is a correspond difference in the need for reliability in the determination that death is the appropriate punishment in a particular case."

Woodson v. North Carolina, 428 US 280 at p. 305 (1976); Accord, Gardner v. Florida, 430 US 349 at pp. 357-60.

In fact, consistent with the principle that "the imposition of death by public authority is so profoundly different from all other penalties (emphasis added), Lockett v. Ohio (1978) 438 US 566 at p. 605; Accord: Gardner, Supra at p. 357, lower courts have insisted that the performance of counsel in capital cases deserves special attention. See: Walker v. Wainwright, 350 F.Supp. 916 (M.D. Fla. 1972); Bernette v. People, 197 N.E. 2d 436, 445 (Ill. 1964) revd in part on other grounds 403 US 947 (1971).

When analyzed in the context that there exists a higher standard for counsel representing capital offense clients, Petitioner has been able to locate numerous instances where the various Courts found ineffective assistance of counsel in cases involving less severe sentences and a higher caliber of competence. See, United States v. Baynes, 622 F.2d 66 (3rd Cir. 1980) [failure to investigate critical source of potentially exculpatory evidence]; United States v. Fessel, 531 F2d 1275 (5th Cir. 1976) [failure of Court appointed attorney to move for court-appointed psychiatrist]; Young v.

Zant, 677 F.2d 792 (11th Cir. 1982) [attorney failed to adopt obvious defenses]; Wilson v. Cowan, 578 F.2d 166 (6th Cir. 1978) [failure to call witnesses ready and able to testify]. United State v. Edwards, 488 F.2d 1154 (5th Cir. 1974); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974).

Petitioner's death sentence and capital conviction rests on a disturbingly high level of ineffective representation at both the trial and on appeal[4] Petitioner has been condemned to die and the severity of his sentence mandates careful scrutiny in the review of any colorable claim of error. Zant v. Stephens, ___ US ___, 77 L Ed 2d 235. The substantial questions on the reasonably effective counsel goes to the heart of the constitutionality of his death sentence and compels this Court tc accept review of this cause and address the question of whether Petitioner was afforded the assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

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4. In appealing the conviction, Court appointed counsel failed to raise several non-frivolous issues regarding the legality of Petitioner's arrest or the admissibility of his statements made while in custody. To further demonstrate counsel's indifference to this Petitioner, counsel failed to appear for oral argument before the en banc Texas Court of Criminal Appeals.

CONCLUSION

In light of the substantial issues raised, Petitioner prays that this Court grant his Petition for Certiorari.

Dated: December 9, 1983.

Respectfully submitted:

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

WALTER KEY WILLIAMS,

Petitioner,

V.

STATE OF TEXAS,

Respondent

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and that I caused the Petition for Certiorari to be served on respondent by placing it in the United States Mail, first class mail, postage prepaid, addressed as follows:

Leslie A. Benitez
Assistant Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711

All parties required to be served have been served.

Done this 9th day of December, 1983.

Gerald H. Goldstein

APPENDIX A

TC-83-25-077

WALTER KEY WILLIAMS, Appellant

NO. 63,971 v. - - - Appeal from BEXAR County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant's conviction and sentence of death for capital murder are here subjected to automatic review. Article 37.071(f), V.A.C.C.P. The murder was committed in the course of robbery or attempted robbery. V.A.T.S. Penal Code, §19.03(a)(2).

In the first ground of error appellant contends that the State failed to adduce sufficient evidence to warrant the jury's affirmative answer to the second punishment issue, posed by Article 37.071(b)(2), supra:

> ". . . whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;. . . ."

Under Article 37.071(c), supra, before sentence of death may be imposed the State must prove beyond a reasonable doubt each punishment question submitted, including "future dangerousness," as the second special issue often is called. Evidence adduced at the guilt stage, including unadjudicated prior criminal conduct of the accused, may be considered by the jury at the punishment stage, and the circumstances of the offense itself, if severe enough, can sustain a "yes" answer. King v. State, 631 S.W.2d 486 (Tex.Cr.App. 1982); Brooks v. State, 599 S.W.2d 312 (Tex.Cr.App. 1979).

Appellant's two written statements to police, admitted into evidence, detail his participation in two robbery-murders within a few hours of each other on the night of February 9, 1981 in San Antonio. Driving his father's automobile, the nineteen year old appellant stopped at a local high school and picked

up an acquaintance named Ted, whom he had known for two or three weeks. They went drinking beer and visiting friends. Ted and appellant both complained of being "broke," and Ted suggested they go to a convenience store. Appellant agreed. According to appellant, "Ted asked who was going to do it," and appellant gave Ted his parents' pistol and told him, "I wasn't going to kill nobody." While appellant acted as lookout, Ted shot the store attendant twice, reached through the window, and grabbed the money.

Ted and appellant split the proceeds, and appellant drove the getaway car, stopping at a dumpster so that Ted could dispose of checks and gasoline receipts from the store. They went to the home of one named Rick and tried unsuccessfully to wake him up. Appellant removed two shells (apparently the spent casings) from the pistol, threw one of them under Rick's bed, and placed the other on the window ledge behind the curtain. They left Rick's, bought some beer, visited a female friend, and went to appellant's house, where he lived with his parents. Appellant asked if he had received any telephone calls, paused to hide his share of the loot in his bedroom, and drove away with Ted.

The details of the second robbery-murder, for which the conviction and sentence in this case were obtained, are best told in appellant's own words:

> "I told Ted that I used to work at a Circle K [convenience store] and then we drove to the Circle K where I used to work at. . . .
>
> We had my mother's gun with us which I had gotten earlier from the house and we had on top

of the front seat between the two of us. 1/ When we got to the Circle K, we drove by and then we parked the car around the corner and then we walked to the Circle K.

I got my mother's gun, which is a .38 caliber or a .32 caliber pistol and I put it in my waistband of my trousers. After we got to the store, we went inside together and I went to the back of the store where the coolers are and I got a sandwich, soda water and then I went to where the chips are and got some potato chips.

I then went to the cashier's counter and put everything on top of the counter. Ted was standing on the other side of the counter opposite from where I was.

. . . I knew the guy that was working there because I met him when I had been working there and his first name was Danny. 2/ Ted had gotten some stuff also so when Danny turned to take care of Ted first, I pulled out my mother's gun and shot Danny one time. I hit him and he fell down.

Ted and I then walked behind the counter. I tried to open one of the cash registers and Ted was trying to get the other register open. I couldn't get the register open, so then I just ran outside and to the car.

Ted stayed inside the store after I left and I did not see what he did or get after I left. I got to the car, got inside and then I drove up to the store and yelled at Ted for us to go.

Ted wouldn't get out of the store, so I left him there. I then drove home and went to bed.

The reason I left Ted at the store because when I was yelling at him, a car drove by and I got scared,

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1/ Pretrial testimony showed that the pistol was his father's and had been lent to appellant by his mother. (More on the gun anon.)

2/ All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

so I left. I did not get anything from the Circle K because I was scared after I shot Danny.

I had been asleep for about 30 to 40 minutes when the police came to my house. . . ." 3/

According to medical testimony, Danny, the victim in the second robbery-murder, died of a single gunshot wound to the back. The body also had abrasions about the face.

Appellant relies on similarities between this case and Roney v. State, 632 S.W.2d 598 (Tex.Cr.App. 1982) in which the defendant had committed another robbery minutes before the primary robbery-murder, but had no prior convictions involving moral turpitude. This Court noted that the two offenses

> "were essentially parts of a one-night crime spree. It does not show a repetition of criminal conduct so much as a single criminal purpose with successive targets." Id., at 603.

No record of prior convictions was introduced in the present case, and, as in Roney, neither was psychiatric or character evidence offered by the State or the accused.[4/] Of course, psychiatric testimony is not essential to support an affirmative answer to the question of future dangerousness. Mitchell v. State, ____S.W.2d____(Tex.Cr.App., No. 68,915, delivered April 27, 1983).

3/ Pretrial testimony revealed that on a table next to appellant's bed lay the murder weapon and a birthday card to him, signed by the young man he had just murdered. The jury did not learn of the card.

4/ Appellant's two trial counsel (one of whom also submitted the appellate brief but made no oral argument before this Court) presented no case at the guilt stage or at the punishment stage.

In Roney no one was shot in the first robbery. However, in the present case appellant's statements show that he and Ted planned the death of both store attendants several hours, not minutes, apart. Although appellant declined to kill the first man himself, he gave the pistol to Ted for that purpose. After participating in that capital murder, appellant selected the second victim, a former coworker, a man he knew would recognize him. The jury was entitled to infer that when appellant drove to the second store he had every intention of killing the attendant in a "calculated and cold-blooded" manner, in order to make sure there were no witnesses. O'Bryan v. State, 591 S.W.2d 464, 480 (Tex.Cr.App. 1979). In this case there was no "conflicting evidence about the shooting," such as the struggle for the weapon in Garcia v. State, 626 S.W.2d 46, 51 (Tex.Cr.App. 1982), and no assertion by the accused that "I had to kill that son of a gun, 'cause he was going to kill me," as in Roney, supra, at 602.

Furthermore, the evidence permitted the inference that by leaving shells in Rick's room appellant planned to implicate him in the first robbery-murder. Appellant also showed lack of concern for others by using his parents' pistol and automobile in the commission of the offenses, and, at the first hint of trouble, by driving off and abandoning his cohort at the scene of the second murder.

Appellant did not act like the "agitated and somewhat distressed individual" in Roney, who at one point laughed about the offense but at other times "repeatedly claimed he 'had to'

kill to defend himself and muttered to himself about the offense." Supra at 603. Appellant drove home and went to bed. Police found him asleep a short time later.

The jury was presented no evidence that appellant was under the influence or domination of any other person, or that he was under mental or emotional pressure which might be regarded as mitigating. The absence of such circumstances is probative evidence of future dangerousness. Russell v. State, 598 S.W.2d 238 (Tex. Cr.App. 1980). Contrary to assertions in appellant's brief, he did not surrender himself to police, as did Roney.

As proof of appellant's "remorse" over the death of the man he shot, he points to his second written statement, in which he said, "I pulled out my mother's gun and shot Danny one time, why I do not know. . . . I then thought about it for awhile and I decided to tell the complete truth. . . . The reason for this is because I have never killed anybody and it bothered me." The jury was entitled to discount such selfserving remarks, made at a time when appellant no doubt knew the police already had obtained overwhelming evidence of his guilt.[5/] The jury rightfully could conclude appellant was so "bothered" by the murder that after committing it he went directly to sleep.

Appellant's own accounts of his involvement in two capital murders and the surrounding circumstances provided sufficient evidence to support the jury's finding of his future dangerousness.

5/ They had the murder weapon and the cooperation of an eyewitness and Ted, appellant's irate abandoned partner.

Appellant's first ground of error is overruled.

In ground of error number five appellant contends the trial court committed reversible error in admitting evidence obtained in violation of his Fourth Amendment rights against unreasonable search and seizure. However, appellant omits any reference to the evidence of which he complains, and thereby fails to comply with Article 40.09(9), V.A.C.C.P., which reads in pertinent part as follows:

> ". . . Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of in such way so that the point of objection can be clearly identified and understood by the court. If the appellant includes in his brief arguments supporting a particular ground of error, they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of arguments made in support thereof in the brief, can identify and understand such point of objection, the same shall be reviewed notwithstanding any generality, vagueness, or any other technical defect that may exist in the language employed to set forth such ground of error."

The fault we decry here is worse than "generality, vagueness, or any other technical defect," which the Court often can overcome by closely considering the ground of error and accompanying argument. Nowhere in the ground of error or argument does appellant identify the evidence he alleges was improperly admitted. The closest he comes to doing so is in his reference to the objection made and overruled at trial (which we have located despite the inaccurate citation to the nineteen volume record):

> "Judge, at this time we would renew our earlier objections which were made in the form of motions on which we had hearings, of anything that occurred after the officers entered the house on the basis that it was an illegal entry, made without warrant, and we would object to any testimony, any evidence obtained as a result of that entry."

Appellant's motion to suppress evidence does not appear in the record, but from our reading of the transcription of the hearing held on that motion we conclude that the evidence principally objected to there and here is the murder weapon discovered by police in appellant's bedroom. In the interest of justice we will address the question of the admissibility of the pistol.

While appellant and his partner, Ted, were still inside the Circle K, an employee from another Circle K store, Roberto Gutierrez, drove by and noticed that his friend, Danny, the attendant he knew was on duty, was nowhere visible. Instead, two black males were at the cash registers, and one of them looked familiar. Gutierrez wheeled around and drove back. When appellant abandoned Ted and fled, Gutierrez pursued appellant and obtained the vehicle's description and license number. Gutierrez returned to the store to find that police had discovered the killing independently, had apprehended Ted nearby, and had returned him to the scene.

Gutierrez gave police the vehicle information and told them about the driver: "He looks like this guy named Walter who works there on the weekends, you know, who has replaced me on the weekends." Ted told police that a person he knew only as "Walter" had shot the deceased with a long-barreled revolver, and that he would show them where Walter lived. At his direction Ted and police drove to a house and found a vehicle in the driveway. The description and license number matched the information given police by Gutierrez.

While Ted was removed to the police station, three officers

approached the front door of the house. Officers testified that they did not approach the house with the intention of arresting anyone. They wished to ascertain whether their information about Walter was correct. Six officers covered the other exits because, as one testified, "It is kind of embarrassing if you have a possible suspect and you are at the front door and he goes out the back door."

The officers testified that they did not seek a search or arrest warrant because they were not sure their information about Walter was reliable. The computer was "down," so they could not check the vehicle registration. In the words of Detective Roy Thomas on crossexamination,

> "A: When I went to the location I was trying to verify the information that I had received from Mr. [Ted] Edwards, if a Walter lived there, and if so, if he would talk to me as to what he said happened, if he had loaned his vehicle to somebody, or, you know, what had transpired, how his vehicle -- if that was his vehicle that had been involved and what had taken place."

Thomas testified that he did not believe he had probable cause to make an arrest or search until he could confirm the information he had received about Walter. For that reason, and because no magistrate was available at 4:30 a.m., he did not seek a warrant.

When Thomas knocked on the front door, according to his uncontroverted testimony, the following occurred:

> "An older gentleman came to the door and I asked him if Walter was there, if Walter lived there, and he said yes, that it was his son. And I identified myself as a police officer. I had my police badge and I showed him my badge and he said 'What is the problem?' He wanted to know what was wrong. I told him that we had information that Walter had been involved in the killing of a man. He acted surprised, you know, shocked and I asked him again if Walter was there and if we could talk to him and he said, 'Yes, come on in,' and so we went into the house."

Appellant's father testified that he consented to the entry by police.

Appellant's father led the officers to a bedroom. The door was open; the room was dark.[6] Someone turned on the light; no one remembered who. Appellant, apparently asleep, lay face down on the bed. On the nightstand beside him was a long-barreled revolver. Appellant's father testified that as he stood in the hallway he could plainly see the pistol.

Thomas moved between appellant and the pistol, awakened him, and, concluding that he then had probable cause, placed appellant under arrest. According to Thomas's testimony, the pistol looked like the one described by Ted:

> "When we got back to the bedroom and the gun was laying there, at that time the fact that Walter was there, the vehicle was there, the weapon was there that matched the description, I felt like there was probable cause to arrest Walter and read his rights to him and everything at that time." [7]

Appellant's father then signed a form, which he read into the pretrial record as follows:[8]

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[6] At some points in his testimony, appellant's father seemed to recall that the light was on, that the door was closed, and that he did not go to the bedroom until later. At other points he remembered going to the bedroom initially with the officers, and seemed to drop his contention that the door was closed.

[7] In this appeal appellant does not challenge, and we do not address, either the legality of the arrest or the admissibility of the statements he made while in custody. We consider here only the actions of police in entering the premises and taking possession of the pistol.

[8] Police testified that appellant also signed such a form. But appellant disputed the signature, and the form does not appear in the record. Later that morning appellant and his father jointly signed another consent form, and at the direction of both men police found in the house the money taken in the first robbery.

"Q [Prosecutor]: Yes, sir, go ahead.

A [Appellant's father]: 'Consent to search, State of Texas, County of Bexar, I, Lucian Williams, having been informed by the hereafter named Texas peace officer that I have a constitutional right to be free from having him or other officers make a warrantless search of the hereafter mentioned premises under my control and also a constitutional right to refuse to give him or any other officer consent to make such a search and that such rights are guaranteed to me both by the Texas and Federal Constitutions, do hereby voluntarily waive those rights and authorize the following named officer, to-wit, Detective B. Hook and Detective L. Dehaven and any other officers working with him to conduct a complete search of the following premises, building and vehicles located in 1302 Wyoming, Texas, at and namely, single story white fram (sic) home known as 1302 Wyoming and a Ford, dark green over light green, license number LNZ 265, and to seize and take therefrom any item of personal property they may believe to constitute evidence in a criminal proceeding.

I have given this consent of my own free will and accord and without being subject to any threats, promises, compulsion, or persuasion of any kind. I know that any item of personal property seized by the above named officer or other officers with him and taken by them from such premises can and will be used in a criminal proceeding, signed Lucian Williams,' witnesses, Roy W. Thomas and -- I imagine it is A. M. Zalesly.

Q: Anyway, you had an opportunity to read that and as far as you know, you did read that as that --

A: I didn't read it thoroughly, but I read it.

Q: It states you had all of these rights and you didn't have to consent to any search at that time, is that right?

A: Do what?

Q: It said you didn't have to consent to any search, is that right?

A: Yes.

Q: But you consented to search, signing that and letting them search your house?

A: Yes."

No one touched the pistol until sometime later, when an investigator arrived.

At the hearing on the motion to suppress, appellant testified that no one was allowed in his bedroom without his permission and that he was in the habit of closing and locking the door. He did not remember whether he had closed the door that night. He testified that there was no key to the lock, which could only be operated from inside, and that his door was not broken down by police.

Appellant's father testified that the pistol was his, and the consent form he signed stated that the house was under his control. The police never displayed any weapons, threatened any force, or asserted any authority to enter without consent. Viewing the totality of the circumstances, we conclude that appellant's father, with full authority to do so, freely and voluntarily gave informed consent to the police entry of the house and the bedroom, and to their taking possession of the pistol. See United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974); Schneckloth v. Bustamounte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); Annot., 4 A.L.R. 4th 196, 1050 (1981). The circumstances here were not unlike those in Coolidge v. New Hampshire, 403 U.S. 443, 489-490, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in which the plurality decided that the actions of police in taking possession of Coolidge's guns with his wife's consent did not constitute a search and seizure at all.

Even if the actions of police amounted to a seizure, they were justified under the "plain view" doctrine, as enunciated in Coolidge and recently clarified in Texas v. Brown, ___U.S.___,

103 S.Ct. 1535, 75 L.Ed.2d 502 (1983):[9] (1) the officers were lawfully on the premises with the consent of appellant's father;[10] (2) the discovery of the pistol was "inadvertent," i.e., the police did not "know in advance the location of the evidence and intend to seize it," Coolidge, supra, at 470, "relying on the plain view doctrine only as a pretense," Brown, 103 S.Ct. at 1540;[11] and (3) when the officers saw the pistol lying beside appellant and fitting the description given by Ted, they had probable cause to believe it was seizable as evidence of a crime.[12] See Sutton v. State, 519 S.W.2d 422 (Tex.Cr.App. 1975)(police, invited by appellant into his home, saw on bedside table in adjoining

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[9] Regarding the Coolidge plurality opinion, the Brown plurality stated, "While not a binding precedent, as the considered opinion of four members of this Court it should obviously be the point of reference for further discussion of the issue." 103 S.Ct. at 1540. That applies as well to Brown.

[10] The unresolved question of who turned on the light in the bedroom is irrelevant, because, as we are told in Brown, 103 S.Ct. at 1541, "the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection." (Footnote with citations omitted.)

[11] The plurality intimated in Brown that, in the final analysis, "inadvertence" might not be a requirement of the doctrine.

[12] The Brown plurality found that the Coolidge plurality's "use of the phrase 'immediately apparent' was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." 103 S.Ct. at 1542.

room a pistol matching the description of one on list of stolen items).

When appellant's father led the officers to the bedroom to talk with his son, "it was not incumbent on the police to stop [him] or avert their eyes." Coolidge, supra, at 489. When officers are lawfully on the premises and "inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous - to the evidence or to the police themselves - to require them to ignore it until they have obtained a warrant particularly describing it." Id., at 467-468. The trial court properly overruled appellant's motion to suppress the pistol.

Appellant contends in his second and sixth grounds of error that the action of the trial court in admitting at the punishment stage evidence of the earlier unadjudicated robbery-murder was error. These grounds are without merit and are overruled. Jurek v. Texas. 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); Williams v. State, 622 S.W.2d 116 (Tex.Cr.App. 1982); Garcia v. State, 581 S.W.2d 168 (Tex.Cr.App. 1979).

Appellant's third ground of error, in which he complains that Article 37.071, V.A.C.C.P. is unconstitutional because its vagueness allows juries to act arbitrarily, is without merit. Jurek, supra. The same is true of his fourth ground of error, in which he contends that the death penalty is per se unconstitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Both grounds are overruled.

In ground of error number seven appellant complains that "section eight of the charge of the court at the guilt phase of the trial limited the jury's consideration to robbery and attempted

robbery. It did not give the jury the opportunity to consider the State's failure to prove other elements of the offense of simple murder." Section eight of the charge reads as follows:

> "If you find beyond a reasonable doubt that on the occasion in question the defendant, Walter Key Williams, did intentionally or knowingly cause the death of Daniel A. Liepold by unlawfully shooting him with a gun, but you have a reasonable doubt as to whether the defendant was then and there engaged in the commission of robbery or attempted robbery of Daniel A. Liepold at the time of the said shooting, if any, then you will find the defendant guilty of murder, but not capital murder."

Under section seven of the charge as shown below, the jury found appellant guilty of capital murder:

> "Now if you find from the evidence beyond a reasonable doubt that on or about the 10th day of February, A.D., 1981 in Bexar County, Texas, the defendant, Walter Key Williams, did intentionally or knowingly cause the death of an individual, namely: Daniel A. Liepold, by shooting the said Daniel A. Liepold with a gun, and the said defendant did then and there intentionally cause the death of the said Daniel A. Liepold while in the course of committing or attempting to commit the offense or [sic] robbery upon Daniel A. Liepold, you will find the defendant guilty of capital murder.
>
> Unless you so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder."

The jury necessarily considered and found the evidence sufficient to prove the "other elements of the offense of simple murder," which are included as elements of capital murder. The only difference between the two offenses, under the facts of this case, is the additional robbery or attempted robbery element of the

latter.[13/]

The portion of the charge complained of properly applied the law to the facts of this case. At any rate, when we consider the complaint in light of the charge as a whole and the jury's verdict finding appellant guilty of the greater offense, we conclude that the alleged error in the paragraph on the lesser included offense, if error, is not reversible. See O'Pry v. State, 642 S.W.2d 748 (Tex.Cr.App. 1982)(Opinion on Rehearing).

In ground of error number eight appellant contends that the trial court committed reversible error by charging the jury at the punishment stage "not to consider or discuss any possible action of the Board of Pardons and Paroles or of the Governor or how long this defendant would be required to serve to satisfy a sentence of life imprisonment." The giving of an almost identical instruction was approved in Freeman v. State, 556 S.W.2d 287 (Tex. Cr.App. 1977) as within the judge's discretion. This ground is without merit.

In ground of error number nine appellant contends that the trial court committed reversible error "by going beyond the

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13/ V.A.T.S. Penal Code, §19.02(a)(1), the "simple murder" statute, as appellant would call it, reads as follows:

". . . intentionally or knowingly causes the death of an individual; . . ."

The capital murder statute, V.A.T.S. Penal Code, §19.03, reads in pertinent part as follows:

"(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
. . .

(2) The person intentionally commits the murder in the course of committing or attempting to commit. . . robbery, ..."

provisions of Article 35.17 [(2), V.A.C.C.P.] and discussing the range of potential punishments with prospective jurors." In capital cases the statute mandates that the trial court "propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion." The statute does not mention range of punishment and does not in any way purport to restrict the discretion of the trial judge in conducting voir dire. Appellant cites no authority for his contention, no incorrect statement by the trial court about possible punishment, and no harm done to his rights.[14/] His own counsel later informed prospective jurors about ranges of punishments for a variety of offenses. No reversible error is shown.

The judgment of conviction is affirmed.

CLINTON, Judge

(Delivered June 22, 1983)

EN BANC

PUBLISH

Teague, J., dissents

14/ Appellant does not contend that any juror was improperly seated or excused.

ORIGINAL

A. 259

83-5995

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WALTER KEY WILLIAMS,

Petitioner,

V.

THE STATE OF TEXAS,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, WALTER KEY WILLIAMS, by his undersigned counsel, asks leave to proceed in forma pauperis to Rule 46, and that the prepayment of costs and the filing of forty (40) bound copies of the Petition for Writ of Certiorari be waived.

Counsel has not yet received an affidavit from the Petitioner, who is presently incarcerated at Texas Department of Corrections, Huntsville, Texas. Mr. Williams' affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

Respectfully submitted,

GOLDSTEIN, GOLDSTEIN & HILLEY
2900 Tower Life Building
San Antonio, Texas 78205

By: Robert B. Hirschhorn
Robert B. Hirschhorn
Bar No. 09719700

Attorneys for Petitioner

NO. 83-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1983

WALTER KEY WILLIAMS,

Petitioner,

v.

83-5995

STATE OF TEXAS,

Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, WALTER KEY WILLIAMS, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present on appeal have been set forth in my Petition for Writ of Certiorari to the Texas Court of Criminal Appeals.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. I am presently incarcerated at the Texas Department of Corrections. I have not worked since June, 1980 and my salary was $ 320 per month.

2. During the past twelve months, I have not received any income from any business, or profession, nor have I received any income in the form of rent payments, interest, dividends or from any other source.

3. I do not have any checking or savngs accounts, nor any other type of account with my financial institution.

4. I do not own any real estate, stocks, bonds, notes, automobiles, or any other valuable property.

5. There are no individuals who are dependent upon me for support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Walter Key Williams
WALTER KEY WILLIAMS

SUBSCRIBED AND SWORN TO BEFORE ME by the said WALTER KEY WILLIAMS on this the 22nd day of December, 1983 to certify which, WITNESS MY HAND AND SEAL OF OFFICE.

Marty L Hollis
NOTARY PUBLIC, WALKER COUNTY, TEXAS

My commission expires: 12-10-86

MARTY L. HOLLIS
NOTARY PUBLIC
WALKER COUNTY, TEXAS
COMMISSION EXPIRES 12/10/86